No. 85-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAULA A. HOBBIE,

Appellants,

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League), pursuant to Rules 36.3 and 42 of the Rules of this Court, moves for leave to file the appended brief amicus curiae in this matter.

The League is a voluntary non-profit organization dedicated to the right to religious freedom and the right to life of all, born or pre-born. The League is especially interested in helping insure the American people's continued enjoyment of the strong protections afforded religious freedom in this Court's Free Exercise Clause cases. To this end the League has filed amicus curiae briefs before this Court in its most recent considerations of the Free Exercise Clause, *Goldman v. Weinberger,* 106 S. Ct. 1310 (1986) and *Bowen v. Roy,* No. 84-780. This brief is another expression of this interest.

The initial question of law which the League will address is the controlling nature of *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Thomas v. Review Board,* 450 U.S. 707 (1981) on this Court's disposition of this matter. The further question of law the League will address is the necessity for this Court to continue to adhere to the requirements of religious accommodation found in its decisions in *Sherbert* and *Thomas* rather than to adopt a standard of deference to any facially neutral state statute regardless of its impact upon the free exercise of religion. This latter position appears to have been suggested in Justice Stevens' recent concurring opinion in *Goldman v. Weinberger,* 106 S. Ct. 1310, 1314-1316 (1986) (Stevens, J., concurring). While the League believes the parties will adequately brief the question of the controlling nature of *Sherbert* and *Thomas,* the League believes that the parties may not extensively consider the impact of Justice Stevens' position on Free Exercise Clause jurisprudence. The League believes this may be the case because appellant will likely concentrate on presenting the strong reasons why *Sherbert* and *Thomas* mandate a holding in her favor and appellees will likely take the opposite view from the League; i.e., advocating reversal of *Sherbert* and *Thomas.* Because adoption of Justice Stevens' position would fundamentally

change the factual and legal showings involved in Free Exercise Clause cases, the propriety of this position is most relevant to the disposition of this Free Exercise Clause matter. Accordingly, the League's brief could provide the Court with valuable input concerning the future development of Free Exercise Clause jurisprudence from a group which has had a continuing concern with the development of this jurisprudence.

The League has obtained the written consent of the counsel of record for the Unemployment Appeals Commission to the filing of this brief. The original of that letter has been filed with the Clerk. In addition, the League has received oral consent from the counsel of record for Paula Hobbie to the filing of this brief. Written consent will likely also be forthcoming and will be filed with the Clerk when received. However, the League has not received any communication regarding consent from the counsel of record for Lawton and Company. Accordingly, a motion for leave to file brief amicus curiae is currently necessitated.

For the foregoing reasons, the League moves to file the appended brief amicus curiae.

Respectfully submitted,

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BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is contained in the Motion for Leave to File Brief Amicus Curiae attached to this brief.

SUMMARY OF ARGUMENT

This Court's previous holdings in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Thomas v. Review Board,* 450 U.S. 707 (1981), clearly demonstrate that the Free Exercise Clause mandates accommodation of Paula Hobbie's religious beliefs and the finding of her eligibility for state unemployment benefits. The controlling effect of *Sherbert* and *Thomas* is not altered by the fact that Paula Hobbie converted to a sabbatar-

ian religion after she had been employed. The Free Exercise Clause protects the exercise of all religious beliefs, irrespective of length of practice. It would be anomalous if Paula Hobbie's change in religious belief, an action at the heart of religious freedom, disqualified her from Free Exercise Clause protection.

This Court should continue to adhere to its precedents in *Sherbert* and *Thomas*. These cases properly implement the interest of religious liberty underlying the Free Exercise Clause by requiring accommodation of religious exercise unless governmental infringement of such exercise is a narrowly tailed means to promote compelling state interests. Interests in religious liberty, however, are not adequately protected by the approach to Free Exercise Clause cases suggested by Justice Stevens in his concurrence in *Goldman v. Weinberger*, 106 S. Ct. 1310, 1314-1316 (1986) (Stevens, J., concurring). This approach upholds state practices against Free Exercise Clause challenge if they utilize neutral, objective standards which treat all uniformly and are motivated by neither "hostility against, nor special respect for, any religious faith." 106 S. Ct. at 1316 (Stevens, J., concurring).

Justice Stevens' proposed standard fails to properly implement the Free Exercise Clause for several different reasons. Initially, the Stevens position reflects an overly expansive interpretation of Establishment Clause policies and, thus, fails to accord the Free Exercise Clause its proper co-equal status. The standard also fails because it is incompatible with the Free Exercise Clause's vital role as a defense against any governmental infringement upon religious exercise which is not a narrowly tailored means to promote compelling state interests. Further, the "uniform treatment" of all religions purportedly promoted by judicial deference to any facially neutral requirement a state enacts is inconsistent with the fundamental constitutional position that the First Amendment's protection of religious free exercise must control how the State treats adherents of various religions. These difficulties with the position advocated by Justice Stevens clearly demonstrate why the accommodation of religious exercise normally required by *Sherbert* and *Thomas* is central to the

effective implementation of the interests in religious liberty underlying the Free Exercise Clause.

ARGUMENT

I.

THE FREE EXERCISE CLAUSE, AS INTERPRETED IN *SHERBERT V. VERNER* AND *THOMAS V. REVIEW BOARD*, REQUIRES ACCOMMODATION OF PAULA HOBBIE'S RELIGIOUS PRACTICES AND A FINDING OF ELIGIBILITY FOR UNEMPLOYMENT BENEFITS.

This case involves the same Free Exercise Clause based challenge to state unemployment eligibility decisions found in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 450 U.S. 707 (1981). This Court's holdings in *Sherbert* and *Thomas* require a decision that the Free Exercise Clause was violated when Florida denied Paula Hobbie unemployment benefits.

Sherbert v. Verner, 374 U.S. 398 (1963), alone appears to require a decision in favor of Paula Hobbie. In *Sherbert*, as here, an employee terminated for not working on Saturdays was denied unemployment benefits. South Carolina sought to justify this exclusion on the basis of Mrs. Sherbert's refusal to accept employment involving Saturday work. This Court, however, found that:

> [N]ot only is it apparent that [Sherbert's] declared ineligibility for benefits derived solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling [disqualifying Sherbert from receiving unemployment benefits] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship.

Sherbert, 374 U.S. at 404. The Court also found that neither

the threat of fraudulent religiously based unemployment claims nor problems resulting to the unemployment compensation scheme from grants of religious accommodation were sufficiently compelling to overcome the infringement upon Sherbert's free exercise. 374 U.S. at 407-409. Similarly, the Court squarely recognized that the accommodation required by the Free Exercise Clause does not violate the Establishment Clause. *See* 374 U.S. at 409-410.

Application of *Sherbert* to this case clearly requires the conclusion that Paula Hobbie, like Adell Sherbert, was denied unemployment benefits on account of her sabbatarian religious beliefs. As in *Sherbert,* there does not appear a sufficiently compelling state interest to preclude accommodation of Hobbie's sabbatarian religious beliefs to the state unemployment scheme.

This Court's decision in *Thomas v. Review Board,* 450 U.S. 707 (1981), equally clearly calls for a conclusion that Paula Hobbie was impermissibly denied unemployment benefits. In *Thomas,* Indiana impermissibly attempted to disqualify an unemployment claimant from benefits on the ground that the claimant's religiously based termination of employment, flowing from religious objections to his work, was not for "good cause arising in connection with employment." *See* 450 U.S. at 712-713. This disqualification is virtually identical to Florida's disqualification of Hobbie on account of a termination for "misconduct" associated with employment. Finding that Indiana's attempt to disqualify Thomas from eligibility for unemployment benefits violated the Free Exercise Clause in the same fashion as South Carolina's attempts to disqualify Sherbert, this Court observed:

> Here, as in *Sherbert,* the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert,* where the Court held:
>
> > [N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.

> Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[1]

Thomas, like *Sherbert,* clearly requires that Florida permit Paula Hobbie to receive unemployment benefits in this matter.

The fact that Paula Hobbie converted to a sabbatarian religion while employed does not alter the Free Exercise Clause analysis. The Free Exercise Clause protects the exercise of an individual's religious beliefs without reference to the length of time the individual has adhered to these beliefs. *Cf., Thomas,* 450 U.S. at 715-716 (Court will recognize religious beliefs as entitled to protection under Free Exercise Clause even though they are not very well articulated and are not shared by certain other adherents of the same religion). Indeed, *Thomas* and *Sherbert* themselves both involve situations in which changed conditions rendered objectionable employment which had been previously acceptable. *Thomas,* 450 U.S. at 718. It would be implausible to conclude that Paula Hobbie's change in religious belief, an action at the heart of the religious freedom protected by the Free Exercise Clause, is not protected by the Free Exercise Clause in the same fashion as the changes in employment conditions which secondarily affected employees' free

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[1] 450 U.S. at 717-718 (citation omitted). The court went on to hold that Indiana's purported justifications for its actions, the avoidance of unemployment occasioned by terminations for "personal" reasons and the avoidance of detailed employer probing into job applicants' religious beliefs, were insufficient to justify Thomas's disqualification. *See* 450 U.S. at 718-719. The Court also relied upon *Sherbert* for the proposition that Free Exercise Clause based accommodation does not violate the Establishment Clause. *See* 450 U.S. at 719-720.

exercise of religion in *Sherbert* and *Thomas*. If the Free Exercise Clause is to mean anything, all religious exercise, regardless of its length of practice, should be equally protected against state interference. Accordingly, *Sherbert* and *Thomas*, viewed in the context of the policy of religious liberty undergirding the Free Exercise Clause, require Florida to accommodate Paula Hobbie's religious practices and to find her eligible for unemployment benefits.

II.

THE ACCOMMODATION OF RELIGIOUS BELIEFS FOUND IN *SHERBERT* AND *THOMAS*, RATHER THAN INSISTENCE UPON "UNIFORM" TREATMENT WHICH IGNORES RELIGIOUS INFRINGEMENT, IS THE ONLY SUITABLE MEANS TO IMPLEMENT THE REQUIREMENTS OF THE FREE EXERCISE CLAUSE.

In this Court's recent decision in *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986), Justice Stevens authored a concurring opinion, joined by Justices White and Powell, in which he suggested that state practices were consistent with the Free Exercise Clause if they utilized neutral, objective standards which treated all uniformly and which were motivated by neither "hostility against, nor special respect for, any religious faith." 106 S. Ct. at 1316 (Stevens, J., concurring). *See also, U.S. v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in the judgment). In essence Justice Stevens' position is that the Free Exercise Clause does not mandate the type of accommodation of religious beliefs to facially neutral state requirements called for in *Sherbert* and *Thomas*, and that the evaluation of the beliefs of religiously motivated individuals necessary for such an accommodation cannot be squared with the proper role of government under the Establishment Clause. *See, Goldman*, 106 S. Ct. at 1316 n. 6 (Stevens, J., concurring).

A careful consideration of Justice Stevens' proposed test, however, illustrates the test's fundamental inconsistency with the effective implementation of the Free Exercise Clause and the values of religious freedom underlying both the Free Exercise Clause and the Establishment Clause. Such a consideration also most clearly demonstrates that the Court's past practice of accommodating religious beliefs to state regulatory practices is the only means to satisfactorily implement the Free Exercise Clause and its underlying religious freedom values.

Predictably, Justice Stevens points to Establishment Clause precedent for the proposition that a state may not consider religious exercise in enforcing statutes of uniform application. *See* 106 S. Ct. at 1316 n. 6. However, use of this precedent ignores the cogent discussions in *Sherbert v. Verner*, 374 U.S. at 409-410, and *Thomas v. Review Board*, 450 U.S. at 719-720, which clearly demonstrate that the incidental "benefit" to religion resulting from the accommodation of religious exercise required by these decisions "manifests no more than the tensions between the two Religious Clauses." *Thomas*, 450 U.S. at 719. The Establishment Clause is as important as, but not more important than, the Free Exercise Clause. The fact that the Establishment Clause could be interpreted in a fashion which could lead members of the Court to believe its policies would preclude the accommodations of religious practice previously held required by its constitutional counterpart, the Free Exercise Clause, suggests that it is Establishment Clause precedent rather than Free Exercise Clause precedent which has been read too broadly.

Justice Stevens' view that any facially neutral state practice can survive Free Exercise Clause scrutiny is also incompatible with the policy of religious freedom which the Free Exercise Clause implements. In criticizing Justice Stevens' apparent position that the impact of a facially neutral practice on the exercise of religion is irrelevant for purposes of analysis under the Free Exercise Clause, Justice Brennan properly noted that: "[T]he Constitution requires [governmental] selection of criteria that permit the greatest possible number of persons to practice their faith freely." *Goldman*, 106 S. Ct. at 1320 (Brennan, J., dissenting). Justice Brennan's statement highlights a truth ignored by Justice Stevens' analysis, the vital importance of the Free Exercise Clause as a defense against any governmental infringement upon reli-

gious exercise which is not a narrowly tailored means to promote compelling state interests.

The shortcomings of Justice Stevens' approach to the Free Exercise Clause are even more clearly seen in Justice Brennan's criticism of Justice Stevens' position that "uniform treatment" of all religions is promoted by judicial deference to any facially neutral requirement a state enacts. Justice Brennan points out that the fundamental difficulty with this approach is that: "Government agencies are not free to define their own interests in uniform treatment of different faiths. That function has been assigned to the First Amendment. The First Amendment requires that the burdens on Free Exercise be justified by independent and important interests that promote the function of the agency. *See, e.g., U.S. v. Lee; Thomas v. Review Board; Wisconsin v. Yoder; Sherbert v. Verner.*" 106 S. Ct. at 1321 (Brennan, J., dissenting) (certain citation material omitted). *Accord, Goldman,* 106 S. Ct. at 1322 (Blackmun, J., dissenting) ("The clear impact of *Sherbert, Yoder,* and *Thomas* is that this showing [that infringement upon religious liberty is the least restrictive means of achieving a compelling state interest] must be made even when the inroad results from the 'evenhanded' application of a facially neutral requirement.")

Clearly, the approach to Free Exercise Clause cases advocated by Justice Stevens in his concurring opinion in *Goldman* improperly places Establishment Clause concerns above Free Exercise Clause concerns and, even more importantly, ignores the interests of maximizing the enjoyment of religious liberty and preventing arbitrary governmental interference with religious liberty which give substance to the Free Exercise Clause. Accordingly, this Court should continue to adhere to the accommodation approach utilized in *Sherbert* and *Thomas,* which gives proper weight to the fundamental interests in religious liberty underlying the Free Exercise Clause. As demonstrated in Section I, *supra,* this approach requires the accommodation of Paula Hobbie's religious practices and reversal of the lower court's decision denying Hobbie unemployment benefits.

CONCLUSION

The decision of the state court of appeals should be reversed.

Respectfully submitted,

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